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FBI Law Enforcement Bulletin

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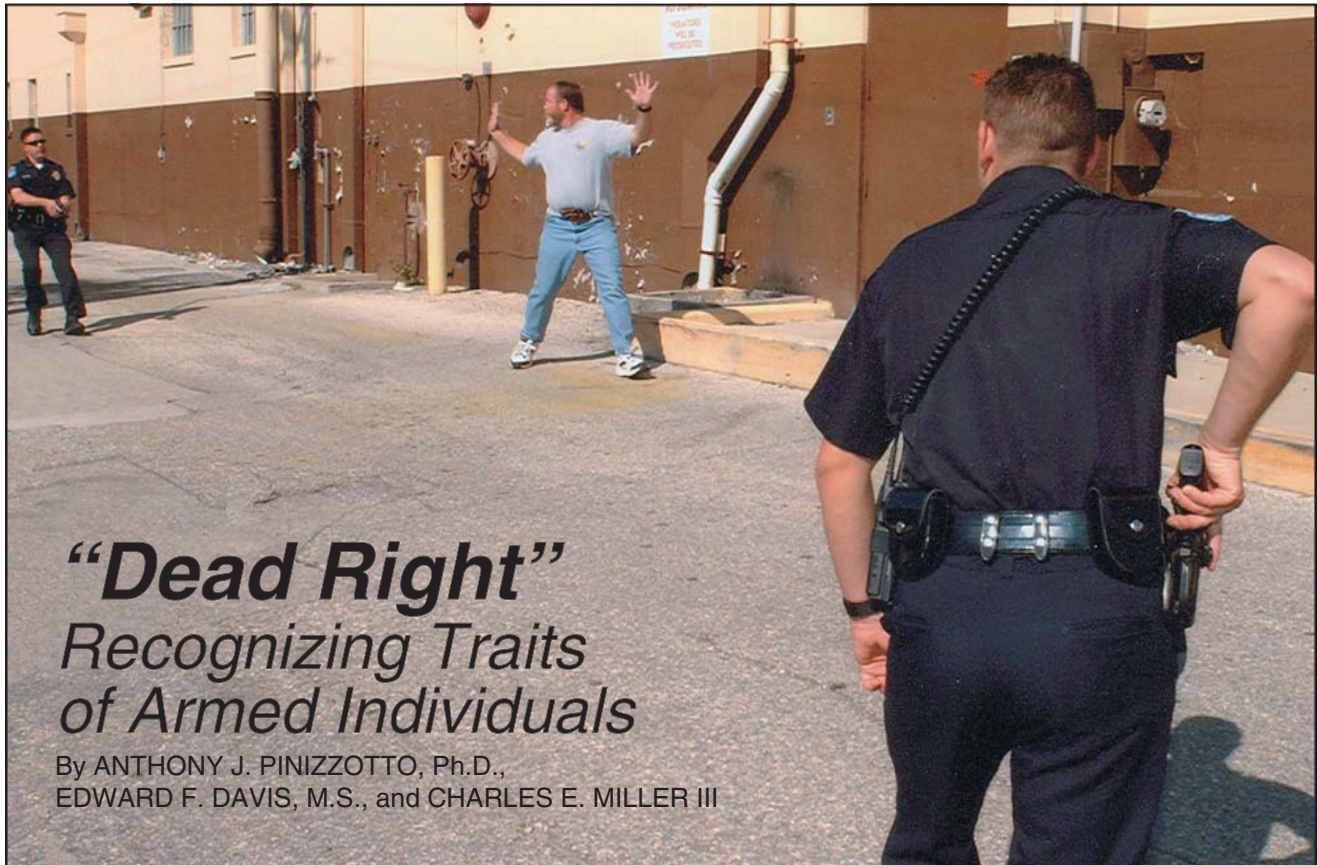
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“Dead Right”

Recognizing Traits of Armed Individuals

By ANTHONY J. PINIZZOTTO, Ph.D.,
EDWARD F. DAVIS, M.S., and CHARLES E. MILLER III

On a warm spring afternoon, two uniformed officers were patrolling a high-crime area in a marked police vehicle. After they turned from the main road onto a side street, the passenger officer suddenly told the driver to pull to the curb because he wanted to talk to a male walking in the same direction that they were traveling. As the officer exited the patrol unit, the male produced an SKS-type rifle from beneath his long coat and shot him. The 7.62x39 rounds from the rifle penetrated the officer's body armor, killing him

instantly. The driver exited the cruiser and also was immediately shot. The man fled the scene, but was later arrested, charged, and convicted of killing the one officer and assaulting the other. Prior to the incident, the slain officer had attended a class on identifying traits of armed subjects. When he saw the male in the long coat, he thought that the man fit some of the characteristics. Sadly, the officer was “dead right” in his suspicion.

This actual shooting incident accurately reveals that officers must be prepared for a

violent encounter when confronting a suspected armed individual. To help officers avoid these deadly situations, the authors present their findings on the traits of armed offenders that they have gleaned from three studies they have conducted over the past 15 years.¹

OBSERVABLE ACTIONS

As most officers know, they are not the only person legally—or illegally—carrying a weapon. What factors can alert them to the presence of another armed individual? What observable behaviors can officers

detect when someone carries a concealed firearm? Recognizing their own actions can help officers answer these questions.

Some Similarities

Sworn law enforcement personnel carry weapons under a multitude of circumstances, not just when in uniform. Other work-related situations can include plainclothes, detective, old-clothes, and tactical assignments. Also, many nonduty-related circumstances exist in which they may carry weapons. So, how do they act under these and similar circumstances?

Officers who work plainclothes assignments, as well as those who carry handguns off duty, are concerned primarily with firearm concealment,

accessibility, and security. Would these matters not be the same for other armed individuals, including criminals? By reflecting on their own behaviors, awareness, and training, as well as refining their powers of observation, officers can enhance their skills in detecting the presence of armed subjects. They should examine not only their own actions but also that of fellow armed officers not in uniform. Do such officers dress in a certain manner that enhances concealment of their firearms? Would offenders do the same? When officers stand, sit, walk, run, or change body positions, do they exhibit specific traits indicating that they possess a firearm? Would armed criminals change body

positions similarly? Officers also know that carrying a concealed weapon over an extended period of time may produce certain automatic body movements or gestures, which they may perform without conscious thought. Could offenders who have carried handguns for a long time also display such unconscious actions?

Major Differences

Of course, officers must account for some major differences between themselves and armed subjects. First and foremost, sworn law enforcement professionals usually obey the law and criminals generally break it. This implies that laws, administrative procedures, or moral ethics rarely constrain



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offenders. As a result, they can use more inventive and devious ways to conceal illegal firearms. For example, in one case, officers arrested a subject who had a firearm concealed inside a car seat occupied by an infant.

Additionally, by regulation, most officers carry handguns in agency-approved holsters. Conversely, the offenders in the authors' three studies did not use holsters. This may have caused many of their traits to become more exaggerated and noticeable or made them express their behaviors in varied but related ways. Finally, if stopped and questioned, officers merely display their identification and usually continue on their way. Criminals who carry illegal handguns realize that if a law enforcement officer stops them, they may face arrest and a possible jail sentence. Because the stakes are considerably higher for them, could this increase their anxiety and cause them to act differently?

CONCEALMENT CHARACTERISTICS

While examining clothing characteristics and behavioral traits, officers also must consider the individual location, surroundings, and circumstances inherent in each encounter. They must ask why a subject is dressed in such a manner, moving in a particular way, or shifting body positions.

Because the male offenders in all of their studies reported regularly carrying handguns in the middle torso area, the authors focus their discussion on this part of the body. But, they also present their findings relative to female offenders, which offer some interesting insights that officers may unwittingly overlook. For example, one female offender had a small .38-caliber revolver hidden in the pocket of her short skirt. Two officers attempted to arrest her and a male companion for

“Officers need to remain vigilant for a separate class of firearms designed for concealment.”

armed robbery. She related that initially one officer approached each of them; however, without searching her, he left her and went to help his partner with the male offender. She promptly walked up to the officers and shot and killed both of them.

Clothing Indicators

Specific observations regarding a person's attire may indicate that the individual is

armed. These may include, but are not limited to, what individuals are wearing during warm versus cold or inclement weather conditions, as well as accessory items and unconventional weapons designed and manufactured for concealment that they may carry.

Warm Weather Conditions

Is the individual dressed inappropriately for existing weather and temperature conditions? A person who attempts to conceal a weapon may wear or carry additional clothing other than that required or appropriate. This suspicious behavior is particularly observable in warm weather. Why would an individual wear a jacket, sweatshirt, sweater, raincoat, or overcoat on a bright sunny day when others are dressed in short-sleeved shirts? Is the individual wearing multilayered clothing, such as two shirts or a pair of sweatpants over a pair of jeans, on a hot day? Similarly, why does a man wearing a shirt and tie, suit trousers, and dress shoes have his shirttail hanging out? Less obvious are individuals in casual attire with their shirttails outside their pants. Such inappropriate apparel can cover areas of the body where criminals frequently conceal firearms. Alert officers, however, may notice a slight bulge or protrusion that raises their suspicions.

Case Example #1

Officers responded to a domestic disturbance call involving a woman who allegedly had threatened several people with a gun but had driven away prior to the officers' arrival. The police department broadcast a description of the woman and the vehicle. A short time later, officers found a woman sitting in the driver's seat of the suspect vehicle. The female officer searched the woman but found no weapon. She was allowed to use a public restroom where she removed a .38-caliber revolver from between her buttocks and shot the female officer. Although mortally wounded, the female officer returned fire and killed the subject.

Obviously, officers can visually detect firearms easier on individuals dressed appropriately for warm weather. They should look for unnatural protrusions or bulges in the waist, back, and crotch areas and watch for less conspicuous cues, such as shirts that appear rippled or wavy on one side of the body while the fabric on the other side appears smooth. Many offenders in the authors' three studies revealed that they purposely transported weapons in their crotch areas as much for concealment as the reluctance of officers to thoroughly search this location.

Cold and Inclement Weather Conditions

Are individuals with a coat, raincoat, or jacket draped over their arms unnecessarily

exposing themselves to the elements? What about those wearing a hooded jacket or coat in the rain or snow without the hood covering the head? One offender stated that he had several friends who carried firearms in their jacket hoods. Also, in periods of extremely cold weather, why would people not fasten their jackets or heavy coats? Could it be that they want quick access to a firearm?

When individuals have on jackets and coats, are these pieces of clothing visibly weighted to one side, giving the appearance of an unusually heavy object in the pocket? Normally, personal items, such as wallets, keys, pagers, and cell phones, do not weigh enough to cause a pocket to hang substantially lower than the one on the opposite side.

Accessory and Other Items Carried

In cold weather conditions, individuals may have a hand warmer attached to their clothing or person in some manner. If these people appear to have been outside for some time, why are their hands not inside the device? If they have on gloves, why do they need the hand warmer? Does it exhibit ripples or waves in the fabric, giving the appearance of containing a heavy object?

What about individuals carrying such items as purses, knapsacks, soft briefcases, gym bags, folded-over newspapers, or paper bags that appear out of place? Do these articles display a protrusion? Is the outline of the frame of a handgun or a partial contour, such as the barrel or butt, visible?

If a person is wearing a fanny pack, can a wallet be seen in a pants pocket? If so, what is in the fanny pack? Does it appear weighted with a heavy object? Most types can conceal a handgun and may include a draw string or a quick-release closure method added for rapid access.

Unconventional Firearms

Officers need to remain vigilant for a separate class of firearms designed for concealment. Generally constructed without sights, these weapons, referred to as "belly guns,"

usually are inaccurate unless fired at a very close range. Manufacturers also have produced handguns intentionally disguised as other objects, including pens, pagers, cell phones, belt buckles, and wallets. Offenders have related that they possessed such weapons to use against law enforcement personnel who may overlook them during arrest or transport situations. The use of a hand-held magnetometer can assist officers in detecting these types of handguns and other potentially dangerous metal instruments, such as knives and razors.

Behavioral Traits

In the authors' three studies, none of the offenders who carried firearms used holsters. They reported frequently touching the weapon with a portion of their hands or arms usually to assure themselves that it remained hidden, secure, and accessible. Such actions become most observable whenever individuals change body positions, such as standing, sitting, or exiting a motor vehicle. Their unholstered handguns tend to shift, causing them to adjust or reposition the weapon to its original position. Walking with a concealed, unholstered handgun requires subjects to occasionally use a portion of their hands or arms to prevent the firearm from moving or to

adjust the weapon after it moves. When they run, their actions may appear more pronounced and may involve constantly gripping the handgun to maintain control.

The majority of female offenders who carried their own weapon preferred small-framed revolvers or automatic pistols. Their choice place of concealment was in a pocket of their outer clothing, with quick retrieval as their primary concern.

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Wearing inappropriate clothing could be completely explainable, depending on the circumstances and surroundings.

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Females often carried a weapon for a male companion prior to or after criminal activity. But, interestingly, no female offender reported giving her weapon to anyone to carry for her.

Law enforcement training teaches officers to keep their gun side away from individuals during street contacts or interviews. Armed criminals do the same in encounters with law enforcement professionals to

ensure concealment and easy access to their firearms. As one offender said, “If they’re on that side of me, they can’t see it. I can also get to it quicker if I need to. Because they can’t see what I’m reaching for, I get that extra second.”

STOPPING ARMED INDIVIDUALS

Basic principles of safely stopping suspected armed individuals should include some primary considerations. Not intended as a comprehensive, stand-alone checklist, this information reflects the personal insights of the authors and other law enforcement officers who have studied or interacted with armed criminals. These perceptions, based solely on observing universal behaviors displayed by armed individuals regardless of age, sex, race, or ethnicity, are neither mutually exclusive nor all inclusive. So, when the authors discuss, for example, the importance of lighting conditions during a traffic stop, they are not diminishing or neglecting the importance of securing adequate and protective cover. Rather, their recommendations highlight the safety of the officer and the community, along with the adequate and sufficient force necessary to effect a stop and possible arrest of an armed offender. Officers must carefully evaluate the facts and

circumstances of each individual incident and weigh the risks versus the rewards of making the stop. They should effect the stop of a pedestrian or vehicle in a manner that affords them the maximum tactical advantage and the greatest opportunity to have sufficient backup assistance present.

Stop Location

One factor frequently within the officer's control, the location chosen to effect the stop, does not have to occur at the site of the initial observation.

Knowledge of the surrounding area proves extremely important in initiating a safe stop. Officers should think ahead and plan for the worst-case scenario. They should consider possible escape routes and the danger presented to other law enforcement personnel and the public should a foot or vehicle pursuit take place.² They also should take into account the possibilities of a firefight occurring. And, of course, they should attempt to effect the stop in a location that affords minimum exposure and risk to themselves and innocent

bystanders. Most important, although officers usually *can* control where they initiate the stop, they cannot depend on subjects necessarily complying. When offenders fail to stop at the chosen site, they may be attempting to select a more beneficial location for themselves, considering options of escape and tactical advantage, or deciding whether to use their firearm against the officer. All of these factors may increase the potential for danger.

Lighting Conditions

Because, historically, most law enforcement line-of-duty deaths and serious injuries have occurred during hours of darkness, the preferred approach and stop location should include optimal available lighting conditions that favor the officer.³ When possible, officers should position themselves to see the offender's hands better. Where low-light conditions exist, officers should attempt to stop the subject where they have the maximum amount of artificial lighting available. Officers also should consider shining light sources, such as flashlights, headlights, spotlights, and takedown lights, in the suspect's eyes to temporarily blind the person. Officers working in tandem can prearrange that one officer concentrates the light source on the subject's

Case Example #2

An officer stopped a pickup truck with a male driver and female passenger for improper driving. The male driver, who had been drinking to excess prior to the stop, immediately drew a small revolver from his waistband and gave it to the female to hold for him. The officer arrested the male for driving while intoxicated and placed the female, who was not under arrest, in the rear of his patrol vehicle. A backup officer arrived and transported the male from the scene. When the officer returned to his cruiser and sat in the driver's seat, the female removed the revolver from her bra and shot him in the head as he sat behind the steering wheel. She was still in the rear of the patrol car when another officer drove into the parking lot and observed the victim officer slumped over the wheel. She made no attempt to use the gun against the second officer. When questioned, she stated that she had a sudden fright of going to jail and shot the officer. She did not have a prior criminal record.

face, while the other illuminates the hands or torso area.

Available Cover

Officers should assess the availability of cover and attempt to take advantage of any that exists. If they effect a stop in an open area that has no shelter, officers should know the location of the nearest one available. They also should consider potential cover that the subject might seek whenever selecting a stop location. Officers always should choose areas that afford the subject the minimum availability of protection and themselves the maximum.

Totality of Circumstances

Officers must take into account the location, surroundings, and circumstances of the stop. Other than unmistakable knowledge that a subject *definitely* is armed, no single observation or trait will suffice to establish reasonable suspicion or probable cause to detain, frisk, or search an individual. Instead, these characteristics are merely indicators, and officers must consider the totality of the circumstances surrounding each of them.

Wearing inappropriate clothing could be completely explainable, depending on the circumstances and surroundings. For example, a traveler who just arrived from a colder

climate may have on an overcoat on a warm sunny day. Perhaps, the person has to carry luggage, making it necessary to temporarily wear the coat. This individual may be near an airport, train terminal, bus station, or subway or in the process of hailing a taxicab. Under these circumstances, the observation of inappropriate clothing for existing weather conditions probably would not constitute

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Officers must carefully evaluate the facts and circumstances of each individual incident and weigh the risks versus the rewards of making the stop.

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a clear indicator that the person may be concealing a firearm because such behavior could be completely understandable.

In contrast, an officer patrolling near an exclusive restaurant on a warm, sunny summer day may know that male patrons are required to wear a jacket and tie. The officer observes a shabbily dressed man hurriedly exit the restaurant and walk away at a

fast pace. He is wearing a heavy raincoat, and, while walking, keeps his right arm pressed against his waistline. These circumstances may indicate to the officer that the subject possibly is armed and may have robbed the restaurant.

By focusing on traits, behaviors, surroundings, and the combined context in which they occur, law enforcement professionals should be able to articulate justification sufficient to effect stops and frisks whenever reasonable suspicion or probable cause are present. Moreover, officers must constantly remind themselves that a recovery of a weapon from a suspect *never* should prohibit the continued search of the violator for additional weapons. After all, the identification of armed criminals, the safe confiscation of their illicit firearms, and the arrest and conviction of these dangerous individuals are of paramount importance in ensuring the safety of all law-abiding members of society.

CONCLUSION

Knowledge, awareness, clear thinking, and finely honed observation skills may give officers an advantage when confronting armed subjects who may emit specific and unique signals indicating the presence of a firearm. However, the absence of such traits and

characteristics does not suggest that officers can let their guards down in any type of law enforcement situation. They never can assume that a criminal is unarmed until they have thoroughly searched the person and the surroundings themselves. Nothing can demonstrate this more clearly than the shooting incident at the beginning of this article. Officers must remain vigilant when dealing with individuals they suspect are armed. After all, no law

enforcement professional wants to be proved “dead right.” ♦

Endnotes

¹ Anthony J. Pinizzotto, Edward F. Davis, and Charles E. Miller III, U.S. Department of Justice, Federal Bureau of Investigation, *Killed in the Line of Duty* (Washington, DC, 1992); *In the Line of Fire* (Washington, DC, 1997); and *Violent Encounters* (Washington, DC, publication pending).

² For additional information, see Shannon Bohrer, Edward F. Davis, and Thomas J. Garrity, “Establishing a Foot Pursuit Policy: Running into Danger,”

FBI Law Enforcement Bulletin, May 2000, 10-15; and John Hill, “High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction,” *FBI Law Enforcement Bulletin*, July 2002, 14-18.

³ For additional information, see Paul Michel, “Visual Perception in Low-Light Levels: Implications for Shooting Incidents,” *FBI Law Enforcement Bulletin*, May 1998, 6-9.

This article is an excerpt from a 5-year study on officer safety that the authors recently completed. Violent Encounters: Felonious Assaults on America's Law Enforcement Officers will be available in the near future.

FBI Law Enforcement Bulletin **Author Guidelines**

Length: Manuscripts should contain 2,000 to 3,500 words (8 to 14 pages, double-spaced) for feature articles and 1,200 to 2,000 words (5 to 8 pages, double-spaced) for specialized departments, such as Police Practice.

Format: Authors should submit three copies of their articles typed and double-spaced on 8 ½- by 11-inch white paper with all pages numbered, along with an electronic version saved on computer disk, or e-mail them.

Criteria: The *Bulletin* judges articles on relevance to the audience, factual accuracy, analysis of the information, structure and logical flow, style and ease of reading, and length. It generally does not publish articles on similar topics within a 12-month period or accept those previously published or currently under consideration by other magazines. Because it is a

government publication, the *Bulletin* cannot accept articles that advertise a product or service. To ensure that their writing style meets the *Bulletin's* requirements, authors should study several issues of the magazine and contact the staff or access <http://www.fbi.gov/publications/leb/leb.htm> for the expanded author guidelines, which contain additional specifications, detailed examples, and effective writing techniques. The *Bulletin* will advise authors of acceptance or rejection but cannot guarantee a publication date for accepted articles, which the staff edits for length, clarity, format, and style.

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Unidentified Homicide Victim

On June 3, 1978, the victim's body was discovered in a shallow grave, covered with brush, near Florida State Road 29, just south of the interchange with Interstate 75 (Alligator Alley). The victim's body was covered with a white substance later analyzed and identified as hydrated or caustic lime, which is used in mortars and cements, as well as for agricultural purposes. Death resulted from blunt force trauma to the head.

Remains Examination

The victim was a white female, approximately 40 to 60 years old, between 5' to 5' 5" tall, and about 176 pounds. She had brown hair and was nude; no jewelry was found on the body. Her eye color could not be determined. Based on the evidence collected, it is suspected that the victim died as a result of homicide. The victim's NCIC number is U260005490.

Dental Examination

The mandibular section presents with ceramco bridges, porcelain fused to metal from the right lateral through the lower right second molar. The bridge is from the first bicuspid to the second molar. It has two bicuspid pontics suspended in between the cuspid and lateral, both of ceramco materials, are individual units. The lower left side has a similar situation. The left lateral is an individual ceramco unit. The first bicuspid and cuspid are double abutted for a five-tooth bridge, which involves two large bicuspid pontics and a molar ceramco abutment. The victim was relatively free of all periodontal disease. It is estimated that the dental work was done approximately 2 years prior to the time of death. For additional dental



information, please contact the investigative agency. A dental chart is available.

Alert to Law Enforcement

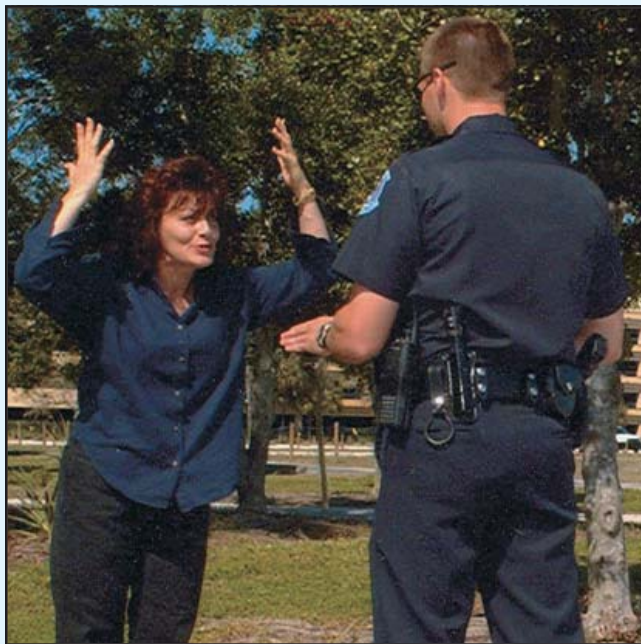
Law enforcement agencies should bring this information to the attention of all crime analysis, missing person, and cold case units, as well as to officers investigating crimes against persons. Any agency that believes this unidentified homicide victim matches their missing person or has a similar case may contact Lieutenant Mike Fox, Collier County, Florida, Sheriff's Office at 239-793-9399 or foxm@flcfn.net; or Crime Analyst Glen W. Wildey, Jr., of the FBI's Violent Criminal Apprehension Program (ViCAP) at 703-632-4166 or at gwildeyj@leo.gov. ♦

The clay reconstruction was completed by Harvey Pratt of the Oklahoma State Bureau of Investigation.

Focus on Officer Safety

Surviving Hostile Encounters ***A Veteran Officer's View***

By Scott D. Burns



Federal, state, and local law enforcement officers in the United States frequently encounter dangerous or potentially hostile criminals in a variety of settings. In the 10-year period 1994 through 2003, over 571,000 officers were assaulted during such situations.¹ A violent offender can come in any form with no restrictions as to size, age, or gender.² Officers must remain mindful at all times of warning signs that a subject they have contacted might become vicious at a moment's notice. Physical confrontations with suspects sometimes can occur when the officer least expects it or during the most mundane of duties. The thought of long-term incarceration, embarrassment, loss of employment, alienation by family or friends, or any number of other factors could signal an unexpected reaction from a person. What can officers do to safeguard themselves from

suspects whose behavior or actions can change instantly? During my more than 27 years in the law enforcement profession, I have discovered some answers.

Watch Body Language

Frequently, suspects exhibit body language indicators that can alert officers to pending violent behavior. Some of these can include nervousness, profuse sweating, shaking, muscle rigidity, dryness around the mouth or lips, and rapid speech. Subjects may look around for an escape route, try to place their hands in their pockets, or pay attention to verbal signals from their companions. Changes in mood in a kind of "roller coaster" fashion also constitute a warning sign.

Officers who work together should communicate with each other in formal and informal training sessions and discuss what actions they might take if a suspect turns violent. Many become so adept at spotting these indicators that they, their partners, and their backup officers react at the same time through nonverbal communication and can control subjects before they can cause injury to themselves, the officers, or innocent citizens.

Communicate Skillfully

Officers' abilities to communicate with the people they contact and to control their own body language represent their best tools in dealing with suspects in a hostile environment. Offenders can sense changes in officers' demeanor and can draw inferences from their body language that could indicate what future actions they may make.³ How officers initially approach suspects could determine whether these individuals cooperate or become violent. Of course, this in no way assures that a confrontation will not occur. But, approaching a person in a calm and professional manner can result in a successful, peaceful contact even when it culminates in an arrest.

I have found that engaging individuals in conversation about something that I suspect interests

them (e.g., their motorcycle parked in front of their house or a collection of books on their bookshelves) often helps. It is surprising how quickly people's attitudes will change when they think you are interested in something that interests them. It can make an otherwise hostile encounter a nonviolent event. I have found major success in using this technique in communicating with individuals during all types of police-related duties. Being able to "read" someone can help defuse hostility when you make the initial contact. But, never forget that the suspect is attempting to read you as well.

Consider Narcotic Use and Mental Illness

Officers who have worked the street environment for any length of time know that, in some cases, they cannot avoid a confrontation. The presence of various narcotic substances, such as methamphetamine, PCP, and cocaine, can deteriorate a situation rapidly with seemingly no logical explanation. Many documented incidents exist where suspects under the influence of some substance sustained numerous gunshot wounds (some ultimately fatal) and continued to function, subsequently injuring or killing officers or citizens before succumbing to their wounds. Sometimes, baton strikes or chemical agents have little or no effect, creating a severe dilemma for officers trying to take individuals into custody. Less lethal weapons (e.g., beanbag rounds and pepper-ball guns), however, have become useful alternatives and have proven effective in some situations. Training with these devices and having them available when needed is of utmost importance. Officers must remain diligent in defensive tactics training and physical conditioning.

The mental condition of a suspect also can influence the outcome of a contact. Some people

with certain mental illnesses do not act rationally and cannot comprehend certain concepts. Sometimes, they can have incredible physical strength. Officers need to be aware of the potential hazards and take appropriate precautions. I feel that it always is advisable to have a minimum of two officers present in these situations. Sometimes, "verbal triggers" can turn a person hostile. This applies not only to those who are mentally ill but to other people as well. I have found that if you detect that a certain topic raises the anxiety level of the contacted person, you should refrain from speaking about it and change the subject. It may take some practice to read a suspect, but the extra effort can prove worthwhile.

Never Underestimate the Suspect

Size, shape, or gender never dictates how potentially violent a person might or might not become. Therefore, never drop

your guard. Some of the most violent physical confrontations I have had with suspects involved persons of slight build, including females. As a result, I offer three main recommendations for officers.

- 1) Be alert, professional, calm, and constantly aware of changes in the suspect's movements and demeanor. If you are going to make an arrest, put the handcuffs on immediately and do the pat search afterwards. Once their hands are immobilized, suspects have less opportunity to obtain a weapon, effectively resist, or flee the scene.
- 2) Trust your instincts and be prepared for anything. Always watch suspects, especially their hands. Suspects allowed to keep their hands in their pockets or out of your view always pose a potential danger to you. Most

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Frequently, suspects exhibit body language indicators that can alert officers to pending violent behavior.

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reasonable persons asked to remove their hands from their pockets and then given an explanation that it is for the safety of all present will understand the reasoning behind the request. Suspects who intend to harm you also realize that you are attentive to their movements and may think twice about attempting a confrontation. I have had offenders tell me after an arrest that they had intended to do physical harm to me but that I never gave them a chance to do so. This is the payoff for paying attention to the subject and your surroundings.

- 3) Do not become so focused that you miss what is going on around you. Use your peripheral vision. Your suspect might have associates nearby that present a potential threat to you and other officers. Always watch your positioning in relation to suspects and keep your gun side away from them.

Train, Train, and Train

You will react the way you were trained. This holds true with driving skills, defensive tactics, firearms use, and officer survival-related scenarios. Having been assigned to a SWAT team as an operator and team leader for a number of years, I know that an officer's need to train frequently is of the highest priority to function in an effective manner in a high-stress situation. You will respond to the stimulus of the event and react, often referred to as "autopilot." As the SWAT operator, I usually was briefed prior to entering the situation and had an idea of what I was up against. In a patrol setting, however, you do not always have that luxury. Things can happen in the blink of an eye.

Training is as critical and often more so in the patrol setting where the unexpected is a given. The moral of the story is simple: train, train, and train.

Conclusion

To be certain, you cannot anticipate every action a suspect might take. Watch the person's hands and avoid using verbal triggers. Use your

communication and observation skills, as well as your training, to enhance your ability to survive and prevent possible violent encounters. Keep yourself updated on the laws and your departmental policies and procedures regarding the use of force. Hold regular formal and informal training sessions with your fellow officers to help anticipate how you and your co-workers will react when confronted by a violent suspect.

Maintain control of your environment when making law enforcement contacts. Stay safe so you can return to your loved ones at the end of your shift. Protect yourself as diligently as you protect your community. ♦

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Endnotes

¹ U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, 2003 (Washington, DC, 2004), 66.

² U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*, 2003 (Washington, DC, 2004), 268-290.

³ For additional information, see Anthony J. Pinizzotto and Edward F. Davis, "Offenders' Perceptual Shorthand: What Messages Are Law Enforcement Officers Sending to Offenders?" *FBI Law Enforcement Bulletin*, June 1999, 1-4.

Sergeant Burns serves with the Auburn, California, Police Department.

The Leadership Paradox

I tend to think of the difference between leaders and managers as the difference between those who master the context and those who surrender to it.

—Warren Bennis
On Becoming a Leader

Organizational success depends on many complex and dynamic influences, such as customer needs and demands, internal and external politics, economics, and certainly the inner culture of an organization. The most important influence, however, appears to be effective leadership. Leadership, quite simply, is the ability to influence others. Leadership is about influencing subordinates, but it also is about influencing peers and bosses. Successful organizations continuously nurture an environment where positive leadership is systemically valued at all ranks throughout the department. With rapidly advancing technologies, post 9/11 concerns of domestic and international terrorism, the globalization of policing as well as criminal efforts, the increasing multiculturalism of communities, and ever-shrinking budgets, there never has been a greater need for effective leadership in law enforcement organizations.

Followers want honest, decisive, and competent leaders. However, over a half century of study has failed to produce one personality trait or characteristic that can be used to clearly predict success or failure. The reason is that effective leadership goes beyond innate

qualities of the leader. It even goes beyond the specific leadership style or behavior of the leader. Effective leadership is the relationship among leaders, followers, and context.

In his book, *The 9 Natural Laws of Leadership*, Warren Blank referred to leadership effectiveness as a “paradoxical reality.” The same leader behavior may be effective in differing contexts. However, the same leader behavior may not be effective in similar contexts at another time. Warren Bennis observed in his book, *On Becoming a Leader*, “I tend to think of the difference between leaders and managers as the difference between those who master the context and those who surrender to it.” We all

have witnessed successful agency heads in one agency fail in their efforts to lead another agency or a troubled sergeant move to a different squad and be very effective. To be effective across all contexts, leaders must be able to fully assess the needs, demands, and nuances of the situation and adapt their behavior accordingly. ♦

Dr. Jeff Green, special agent in the Leadership Development Institute at the FBI Academy, prepared Leadership Spotlight.





Edged Weapons ***Traditional and Emerging*** ***Threats to Law Enforcement***

By L. FRANK THOMPSON and CHARLIE MESLOH, Ph.D.

The actions of the September 11, 2001, hijackers clearly demonstrated the genuine threat of an edged-weapon attack. They showed that someone with a relatively small amount of training and a crude cutting instrument could inflict serious bodily injury or death. Although attacks of this magnitude are relatively rare, law enforcement officers frequently encounter individuals with edged weapons. While the majority of these subjects may carry these weapons for defense against other street criminals, they, in fact, may use them

against officers under the right circumstances.

By examining some of the issues involved with edged-weapon attacks, officers can garner a framework for future training and awareness. While some of the weapons officers now face are the same ones they encountered 30 years ago, a number of new products have reached the commercial marketplace that will require them to adapt to these emerging threats.

SCOPE OF THE PROBLEM

Almost all of the research on edged-weapon assaults has

come from Great Britain where, due to their stringent gun laws, attacks most likely occur with an edged weapon, rather than a firearm. The majority of this research involved case studies that analyzed the type of attack (e.g., slash versus stab) from hospital admissions or autopsy reports from the medical examiner's office. While many of these studies occurred over a long period, the sample sizes were quite small.¹ Much of the other available data dealt with stab or slash protection, the physics of edged-weapon attacks, the types of edged

weapons most commonly used in attacks, and the probability of survival. While all of this information exists separately, it would benefit law enforcement officers for it to be summarized and analyzed in its totality.

Case Studies

Of the six case studies that the authors found, five relied on information from sources in the United Kingdom and one came from Kuala Lumpur, Malaysia. Of the studies from the United Kingdom, four were from England and one from Scotland. Much of this literature has come from the United Kingdom because stabbing is the most common method of homicide in that area.²

In each of the studies, except for one,³ the researchers recorded the location and number of wounds in addition to the age and sex of the victim and, when available, that of the assailant. For law enforcement officers, the most important information gleaned from the research revealed that in every study, the average number of stabs or slashes was one and that in many cases, that one strike was enough to cause the victim's death. Of course, all of these attacks involved victims not wearing body armor. This would make it much easier to thrust into the heart of such a person than into an officer

wearing a stab-resistant protective vest.

Four researchers studied 120 victims admitted to an Edinburgh hospital for edged-weapon attacks.⁴ Of those, 20 died from their injuries, with 16 of them experiencing the most severe trauma to their chests and only 5 making it to the hospital for treatment. Of 148 homicides from stabbing recorded by the Royal London Hospital, 67 had a single, fatal stab wound.⁵ The researcher calculated that of these 67 single wounds, 22 hit the heart and 17 the heart and a lung. Multiple stab wounds accounted for the remaining 81 homicides, and, of these, deaths occurred from chest wounds in 61 cases. In another study, 36 percent of male assailants inflicted one

wound compared with 57 percent of female offenders.⁶ Of these single fatal wounds, 27 out of 39 hit the chest of the victim. Of an additional 74 lethal stabbings reviewed by researchers, 27 single wounds were fatal, with 18 of these occurring in the chest.⁷

Just as in the United Kingdom, edged-weapon attacks are a common method of homicide in Malaysia, but one researcher determined that slash or chop injuries produced more fatalities than stabbing wounds.⁸ The study dealt with 37 cases from a 10-year period of autopsies at the University Hospital in Kuala Lumpur. Out of 27 cases that fit into the researcher's "intentional violence" group, 16 of the victims received more than 5 wounds from their attackers.



Mr. Thompson is the program manager of the Center for Excellence in Public Safety and Law Enforcement at Florida Gulf Coast University in Fort Myers.



Dr. Mesloh is the director of the Institute for Technological Innovation and Research at Florida Gulf Coast University in Fort Myers.

Of all of the cases involving multiple wounds, 18 were directed at the head, 15 to the neck, and 12 to the trunk, or torso, of the victim. Only eight victims died as a result of a single wound and six of these involved neck wounds. These statistics coincide with the study's examination of slashes as it is much easier to produce fatal trauma by slashing at the neck (e.g., severing vertebrae or hitting the carotid arteries) than it would be to slash at the chest because the ribs provide a great deal of protection to the heart and lungs. Unlike the studies conducted in the United Kingdom that involved only knives, this study included swords, machetes, sickle-shaped implements, gardening tools, and various edged weapons indigenous to Indonesia, such as the curved karambit. Coincidentally, the karambit has seen a substantial increase in its use in the United States as several reputable knife companies have begun producing high-quality versions and a subculture of martial artists train with it.

Assault Data

A review of 20 years of law enforcement injury reports in the United States indicated that on average, 1,358 officers are attacked with edged weapons each year.⁹ This number has fluctuated over time, with its

lowest point of 871 attacks in 1996 and the highest of 2,095 in 1992. On average, over the 20-year period, between three and four knife attacks on officers have occurred every day. This statistic alone illustrates the need for further edged-weapon awareness.

“

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THREATS TO LAW ENFORCEMENT

According to one researcher, the majority of civilian edged-weapon assaults occurred in the home and were inflicted with a kitchen knife, whereas a large number of injuries took place on the street with folding or sheath knives.¹⁰ Recently, three British physicians called for a ban on large, pointed kitchen knives after finding that at least one-half of the stabbing cases involved this type of instrument.¹¹ Prior research has shown that the length of the blade is not as important as the

sharpness of the tip when it comes to penetration of the skin.¹² Consequently, a blade with a length of less than 3 inches can produce a fatal stab injury, while an adequately sharp instrument of any length can inflict a fatal slash to a sensitive area, such as the neck. “The *ideal* weapon is, in fact, a short thin-bladed knife, with a stiff blade, about 7 cm in length—many lock knives and small sheath knives fall into this group. Larger knives (ornamental daggers, militaria) required far greater force.”¹³ Unfortunately, most state statutes’ definition of a common pocket-knife, which is legal to carry without a permit, provides little legal recourse in the reduction of these weapons on the street. As a result, officers tend to overlook the potential threat to their safety.

In the past, officers making contact with an individual carrying a balisong (butterfly knife) automatically would view the person as a potential threat. They assumed that the subject could produce the weapon rapidly for immediate use. Recently, a number of knives that can be deployed much more rapidly than the balisong and, yet, are legal to carry in most jurisdictions have been marketed to the civilian population. The emergence of the one-handed opening knife presents

a much greater threat as someone can draw it quickly from a pocket and open it in less than a second. Some manufacturers design their knives so they open as the person draws it. If suspects have knives clipped to their pockets, they are essentially “on guard” whenever their hand touches the clip. Yet, many officers often fail to recognize this as a threat and may allow a suspect to retain the weapon during an encounter.

Frequently, individuals carry one-handed opening knives in their front pants pockets on the strong side of their bodies. Officers can easily identify these weapons by a metal clip that extends 1½ to 2 inches out of a suspect’s pocket.

TRAINING ISSUES

The 21-foot rule, a dogma of law enforcement training, has held that at a distance closer than 21 feet, a suspect with an edged weapon in hand could stab an officer before that officer could fire two shots. However, one researcher found that an individual can cross 30 feet in 2 seconds and suggested that the person could travel 70 yards before succumbing to injuries created by an officer’s firearm.¹⁴ According to the FBI, “There is sufficient oxygen within the brain to support full, voluntary action for 10 to 15 seconds after the heart has been destroyed.”¹⁵

This suggests that 21 feet is an insufficient safety zone during an edged-weapon encounter. Unlike shooting a firearm, lashing out with an edged weapon is a primitive, instinctive action that a subject can accomplish in that 10- to 15-second window. At the beginning of the 20th century while conducting operations in the Philippines, members of the U.S. Marine Corps found that insurgents, although fatally wounded in the chest, still could move forward and issue a final blow from their edged weapons, seriously wounding or killing Marines. These experiences support the FBI data that even after being mortally wounded, a suspect with a knife still can inflict injury or death to an officer.

RECOMMENDATIONS

What can officers do to protect themselves? Identifying the threat of a one-handed opening knife is the first step. Law enforcement agencies should review their policies, procedures, and case law in the formulation of a plan for disarming suspects carrying knives. The greatest tool that officers have in their arsenal is maintaining distance as it gives them time to react to an attack. Because it is not always feasible to stay 30 feet away from a suspect, officers should consider the option of disarming the person and returning the weapon if no further probable cause exists. This may prove problematic as officers encounter resistance from suspects who do not want to relinquish their weapons.



As part of officer training, law enforcement agencies need to establish protocols for disarming suspects before officers interview them. Ideally, this process would involve two officers—with at least one being armed with a less lethal weapon in the event that the situation deteriorates—as the other officer tries to disarm the suspect. At no time should officers allow subjects to touch their weapons or take them out of their pockets, even if they offer to remove them and place them on the ground. Once suspects have made contact with their knives, they can quickly transition to opening the blade and assaulting the officer, with potentially deadly

consequences. In one study, for example, 45 percent of edged-weapon attacks resulted in death from a single stab or slash.¹⁶

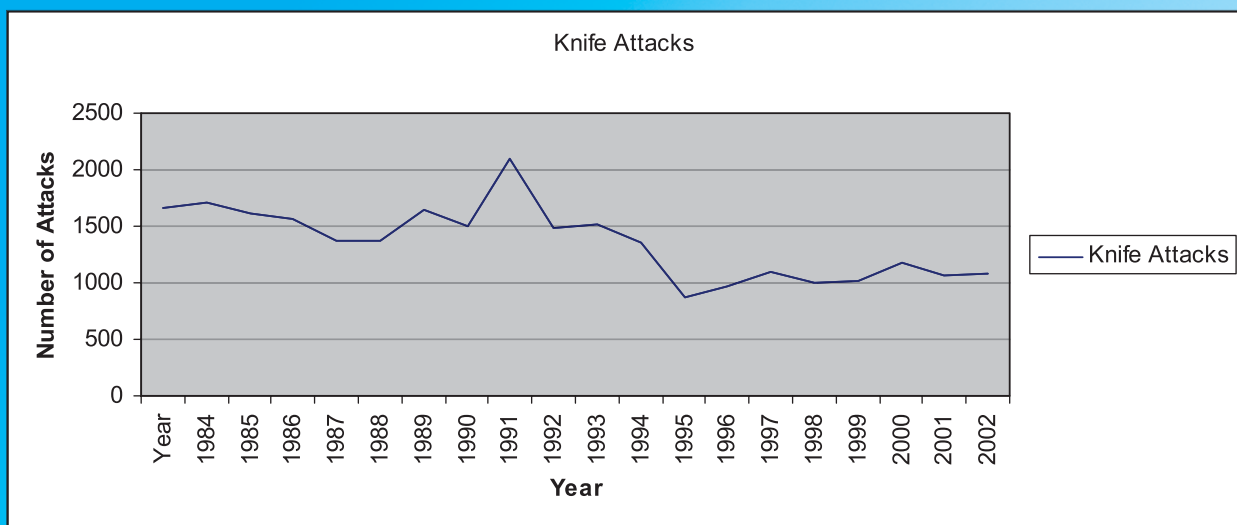
CONCLUSION

Based on prior years of law enforcement assault data, the profession knows that over a thousand officers will face an edged weapon in the next 12 months. Equally recognized is the fact that it may not always be possible to place a suspect outside the danger zone. Law enforcement encounters tend to take place face-to-face, which may give a subject an advantage in an edged-weapon encounter. Consequently, officers need to be aware of the presence of knives and other edged weapons

to reduce the delay in their reaction times.

While ballistic body armor provides a degree of protection against slash attacks, most modern pocketknives have the ability to puncture the material unless the weapon strikes a trauma plate. Furthermore, vests do not protect vulnerable targets, such as the carotid and brachial arteries, that can lead to unconsciousness or death if severed. The subclavian and femoral regions also are exposed and can be vulnerable to an edged weapon with a blade length less than 3 inches. However, with proper preplanning, officers can substantially reduce their exposure to an edged-weapon attack. They must

Chronology of Knife Attacks on Law Enforcement Officers



recognize all edged weapons as threats and neutralize them before such weapons reach their intended targets. ♦

Endnotes

¹ For example, B.B. Ong, "The Pattern of Homicidal Slash/Chop Injuries: A 10-Year Retrospective Study in University Hospital Kuala Lumpur," *Journal of Clinical Forensic Medicine* 6 (1999): 24-29; and D.A. Rouse, "Patterns of Stab Wounds: A 6-Year Study," *Medicine, Science, and the Law* 34 (1994): 67-71.

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¹¹ W. Hern, W. Glazebrook, and M. Beckett, "Reducing Knife Crime," *British Medical Journal* 330 (2005): 1221-1222.

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¹³ Supra note 10, 162.

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¹⁵ U.S. Department of Justice, Federal Bureau of Investigation, Firearms Training Unit, FBI Academy, *Handgun Wounding Factors and Effectiveness* (Quantico, VA, July 14, 1989).

¹⁶ Supra note 4.

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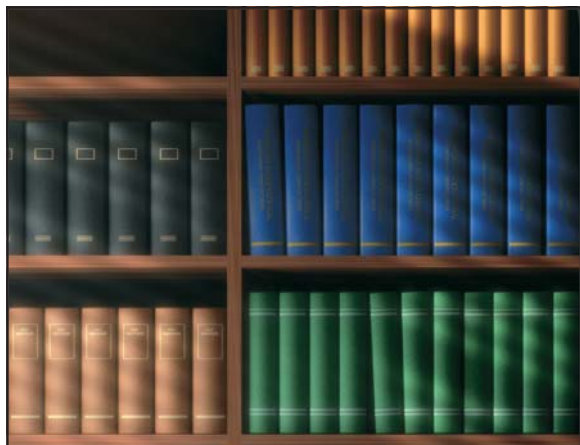
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Policing Within the Law: A Case Study of the New York City Police Department, John Eterno, Praeger, Westport, Connecticut, 2003.

Not merely a catchphrase in the American law enforcement vernacular, proactive policing appears as the key to a successful future in crime control, represented under such names as police crackdowns, problem-oriented policing, community policing, quality of life, zero tolerance, and broken windows. Within this context, an image of the American law enforcement officer as a crime fighter emerges. But, also in this realm lies the sometimes overlooked yet equally important concept of respecting procedural due process.

Author John Eterno has done an excellent job researching how New York City Police Department (NYPD) officers behave within the constraints of the law. The most salient conceptual point Eterno makes is that policing is a difficult job made even more so by the ambiguities in the law. He points out how NYPD officers justify their actions in the face of ambiguous and unambiguous laws during person stops and drug and weapon searches.

Fourth Amendment judicial decisions frequently are vague, sometimes contradictory, and almost always left without a bright-line rule. Furthermore, seemingly simple words may be unclear because they have more than one meaning, which can lead to different interpretations and conclusions. The resulting ambiguity creates uncertainty in the minds of officers, thus, in certain situations, they may increase their search activity. Eterno's significant research finding was that officers "take advantage of slight ambiguity in the law regardless of the situation. Yet, in dangerous activities, it appears that officers will take advantage of ambiguous legal situations and stretch the law to its limits—searching as necessary." Officers use their discretion to protect themselves from rapidly unfolding street situations not specifically guided by sterile case law. Eterno also found that search situations involving a bright-line rule were more likely to be followed than situations without a bright-line rule. That is, officers tended more toward legal behavior when confronted with bright-line rules than when left to their discretion.

Although the research is cross-sectional and analyzes only one agency, the results are not generalizable. However, law enforcement agencies around the country undoubtedly can relate to the findings through their own experiences with the complex case law in their own states. Eterno does a thorough job describing the policy implications and the context in which police work takes place, including—

- the legal framework in which the police operate;
- the importance of the study to the NYPD and to the broader law enforcement community;

- the juxtaposition of crime control versus due process, two competing models of justice;
- the relevant body of case law, both state and federal, that shape officer behavior;
- the methodology used to study officer behavior;
- the influence of court decisions on police field practices, including the exclusionary rule;
- the changes in officer behavior based upon the ambiguity of the law; and
- the extra legal influences on police behavior, such as police culture, the community, and the organizational bureaucracy.

Eterno brings more than 20 years of law enforcement experience to this research project, which enhances the study's credibility. The book contains authoritative citations and the questionnaire used to sample police officers. In police departments, those tasked with research, analysis and planning, legal affairs, and in-service training will find this book an excellent reference for policy development or search and seizure law. Academics teaching constitutional law/criminal procedure, criminal justice policy analysis, and law in the criminal justice system also will find this text a welcome addition to the reading list.

Reviewed by
Captain Jon M. Shane, Ret.
Newark, New Jersey, Police Department

Wanted: Book Reviews

The *Bulletin* invites criminal justice professionals to submit reviews of recently published nonfiction books they have read on topics relative to their field of expertise for possible inclusion in its Book Review department. The magazine publishes only positive reviews of between 350 and 500 words or 1½ to 2 pages double-spaced. As with article submissions, the *Bulletin* staff will edit book reviews for style, length, clarity, and format.

Book reviewers should include two or three compelling points that the author makes, along with the complete title of the work; the names of the authors or editors; and the publishing company, city and state, and publication date. As a guide, the staff suggests that reviewers examine book reviews in past issues of the *Bulletin* to acquaint themselves with the magazine's requirements. Reviewers should submit their book reviews typed and double-spaced on 8½- by 11-inch white paper with all pages numbered. Reviewers should include an electronic version of the review saved on computer disk. Send book reviews to:

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Notable Speech

Things I Wish Somebody Had Told Me

By Gerald W. Garner, M.A.J.

As I look at you, the ready-to-graduate law enforcement officers here today, I'm trying to decide what I can say that would be helpful to you. My career in policing certainly would have been less painful and even more satisfying if somebody had told me a few important things when I started this job 36 years ago. Those things are what I want to share with you today, hoping that you can avoid hitting some of those rough spots in the road that many of us old-timers have hit. And, as I look at some of my colleagues here today with just a touch of gray showing, I think they will attest to the truth of what I have to say.

Do not take yourself too seriously. Laughter—at the appropriate times—can help you survive on this job. A healthy police organization is one where you can hear a lot of laughter. No one wants to work at a place where everybody looks and sounds miserable all the time, so do your part.

Remember everything we taught you about officer safety, but realize that most people are not going to try to kill or hurt you. Some of them actually like cops. Most folks are not bad guys, so once you have determined that you are not in danger, it is perfectly all right to smile and loosen up a little. It feels better, too.

When in doubt, ask yourself how you would like to be treated if the roles were reversed. Or, how would you like for your mother, spouse, or child to be treated by someone wearing that uniform? I call this the "Golden Rule" of policing. Try your best to follow it.

Do not try to be a crime buster 24 hours a day, 7 days a week. First, it will wear you out. Second, 24-hour crime crushers sometimes get themselves into situations they should not. Use common sense when deciding to intervene directly, perhaps, to save a life. Realize that sometimes the smartest

thing you can do is call 911 and be an excellent witness.

Identify someone you can talk to about your biggest worries and your darkest fears. For some people, that may be a spouse, boyfriend, girlfriend, parent, or peer with whom you feel comfortable. But, make sure you are talking to someone about those stresses and perplexities at work. If you try to keep it all inside, eventually, you will explode.

Do not try to totally shield your loved ones from what is going on at work. If you do, you may only succeed in worrying them when you come home "acting differently." A spouse may assume there is someone else. You do not have to relate every detail of a grisly story troubling you, but do let them know what is bothering you. They just might be able to help.

Be careful who you emulate. It is perfectly natural that, sometimes, a new officer wants to be

Chief Garner of the Fort Lupton, Colorado, Police Department delivered this speech at the graduation ceremony of the Red Rocks Community College Law Enforcement Academy in Lakewood, Colorado, on April 16, 2005.



“just like my training officer.” But, realize you never can be anyone but yourself. That is good enough. Put together the kind of officer you want to be by assembling the best parts of several veterans you have observed in action. Then, make your own improvements in the way they operate.

Assume that until and unless they prove otherwise, you *can* trust the wisdom and decisions of your supervisors. As a rookie, I was convinced that my sergeant’s foremost goal in life was to keep me from having any fun. Now, many years later, I realize that he was trying to keep me out of trouble at the same time he was helping me learn. It is amazing how much smarter he has gotten over the years. Please trust us. I think you will find that we rarely let you down.

Watch out for that dangerous 3- to 5-year mark when you think you have all the answers. The truth is, you probably do not. If you survive that risky period, you almost certainly will recognize that law enforcement is a field where you never have all the answers. Try to keep learning throughout your career.

Realize that good ends *never* justify bad means. Do not cheat. It is as simple as that. Excessive force, for example, is never all right, no matter how evil the criminal. Always follow the rules; it is the right thing to do.

Accept the fact that people will seek you out, on duty and off, for your opinions. Enjoy the attention. You are doing something special that people who make a lot more money than you do find exciting and interesting. Granted, you may not enjoy the interruption when you are trying to have a dinner break at the local diner. But, try to be patient and enjoy being an “expert.”

Step back and look at yourself from time to time. Are you getting badge heavy? All of us who have been on the job awhile have known both men

and women who fit the description. If you find yourself becoming a victim of that syndrome, lighten up a little.

Realize that you truly are part of a cause. Few people are today. As corny as it may sound, you really are part of the “thin blue line” that stands between the good people and those who would victimize them. That’s why most of us pinned on the badge in the first place, so do not be ashamed to admit it.

If you ever cease to enjoy what you are doing at least most of the time, get out of the work. Every now and then, I have to tell that to a police officer. Some people simply are not cut out to do this job. That does not mean anything is wrong with them; they simply would be happier doing something else. Life is too short to be unhappy. It would be unusual if every one of you here

today is meant to spend a whole career in this job. If you sense over time that this career is not what you expected, do not hesitate to make a change. You owe it to yourself and your loved ones.

Always listen to the little voice—your common sense telling you that if you do something or fail to do something, you are liable to get into trouble or worse. It is the same little voice that you should have listened to as a kid but, generally, did not. Oftentimes, you later wished you had. If it feels wrong, it probably is.

As we taught in the academy, try to forget what the television shows tell you about how cops are supposed to act. I saw a television show where the cop’s wife was telling somebody, “He needs the booze and extra women to take the edge off.” Do not believe the fiction. Be strong enough to be your own person.

Use the video camera test. If a camera was recording what you are doing or thinking about doing and your loved ones were watching the

“

**Identify someone
you can talk to
about your biggest
worries and your
darkest fears.**

”

program, would you still be comfortable doing it? Act on what your conscience tells you. It is your best guideline for the middle of that dark, lonely night when no one but you may ever know what you do. Never forget who we work for and why we are here. We do, after all, have customers—they are why we are here. Some of them are sitting with us today. In many cases, they pay the taxes and foot the bills. We always owe them our best.

You have just received a free, front-row seat to the greatest show on earth. All three rings are full

most of the time. Enjoy the show. Have fun—appropriately—in the best job in the world. Few people will get to do what you are doing.

Do not be in a rush to leave the greatest position in law enforcement. Many veteran officers will tell you that their first position as a uniformed patrol officer was the most fun they had in law enforcement. I agree with them. You can learn and accomplish a great deal there. May each of you have a safe, enjoyable, and contributing law enforcement career. ♦

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Sexual Harassment by Supervisors

*How Well Do You Know
Who You Are
Promoting?*

By LISA A. BAKER, J.D.



Since 1976, Title VII of the Civil Rights Act¹ has been interpreted as supporting a cause of action on the part of employees against their employers for harm caused by unwelcomed conduct of a sexual nature.² This presents employers with a complex dynamic in which they must navigate with employees. On the one hand, efforts should be made to prevent improper sexual conduct and, if it occurs,

to remedy the situation. On the other hand, Title VII does not mandate a workplace that is gender neutral. The U.S. Supreme Court itself has recognized that the antidiscrimination provisions within Title VII do not prohibit “genuine but innocuous differences in the ways men and women routinely act with members of the same sex and of the opposite sex...simple teasing, offhand comments, and isolated incidents (unless

extremely serious) will not amount to [discrimination].”³ Accordingly, the types of conduct that constitute actionable sexual harassment have been narrowly construed. As stated by the Supreme Court, “[w]e have made it clear that conduct must be extreme to amount to a change in the terms, conditions and privileges of employment.”⁴ However, recognizing the impact improper sexual conduct can have on the well-being of

employees and work performance, the Court has taken a hard line when it comes to the accountability of the employer when supervisors engage in improper sexual conduct with respect to subordinate employees.

This article discusses the extent to which employers may be liable for the improper sexual conduct of supervisors. This includes how, in some cases, the employer may not even have the opportunity to offer a defense to liability.

WHAT IS SEXUAL HARASSMENT?

The conduct that falls within the ambit of Title VII of the Civil Rights Act must first of all be conduct that occurs because of one's sex. Conduct may be vulgar, hostile, and offensive, but unless the plaintiff is able

to establish that it is conduct motivated because of the plaintiff's sex, it is not actionable under Title VII as "sexual harassment."⁵ For example, in *Succar v. Dade County*,⁶ a schoolteacher brought a sexual harassment claim against his school district alleging that it failed to eliminate a hostile environment caused by a co-worker with whom he had terminated a relationship. He claimed that she demeaned and ridiculed him and otherwise subjected him to a hostile environment. The circuit court agreed with the lower court's conclusion that the conduct was not because he was a male but, rather, a result of the acrimonious end to their relationship.⁷

Related to the requirement that the harassment be because of the gender of the person, as opposed to the sex being merely

coincidental, is the Supreme Court's ruling in *Oncale v. Sundowner Offshore Services*.⁸ In this case, the Supreme Court held that same-sex harassment also is covered by Title VII when it is established that the offensive conduct was directed at the victim because of the person's sex.

Traditionally, once the conduct was determined to be based on gender, it then would be categorized as either quid pro quo sexual harassment or hostile work environment. While these terms are not found within Title VII of the Civil Rights Act, their role in determining whether an employer should be held liable became well established.⁹

Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment is predicated upon a showing by employees that their response to unwelcome sexual advances was subsequently used as the basis for a tangible employment action.¹⁰ Establishing a link between the unwelcome, improper sexual conduct and the employer's action is crucial to proving quid pro quo sexual harassment.

Hostile Work Environment

The extent to which Title VII of the Civil Rights Act encompasses hostile conduct arising in the work environment



“Establishing a link between the unwelcome, improper sexual conduct and the employer's action is crucial to proving quid pro quo sexual harassment.”

Special Agent Baker is chief of the Legal Instruction Unit at the FBI Academy.

has been well recognized since the U.S. Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson*.¹¹ In *Meritor*, the Supreme Court stated that the conduct, first of all, must be unwelcomed, and then emphasized that it must be so severe and pervasive as to "alter the conditions of [the victim's] employment and create an abusive working environment."¹²

An in-depth study of what specific behaviors and actions would create a hostile environment is not within the scope of this article. However, a few general principles have been offered to aid in assessing whether conduct has crossed the line. First, the Supreme Court has held that to be actionable under Title VII, a sexually objectionable environment must not be only objectionable in the eyes of a victim but a reasonable person of that gender also must conclude that it would be objectionable.¹³ In addition, all of the circumstances surrounding the conduct should be considered, including the frequency of the objectionable conduct, its severity, whether it is physically threatening or humiliating or simply utterances or gestures, and whether it interferes with the victim's ability to work.¹⁴

Employers have been held to a strict standard of liability, referred to as vicarious liability,

for the sexually harassing conduct of supervisors, enabling employees alleging they were the victims of sexual harassment to hold employers liable without the need to establish knowledge or constructive knowledge of the offending conduct and failure to remedy it on the part of the employer. If the nature of the sexual harassment was *quid pro quo*, the employer had no defense to the

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Employers have been held to a strict standard of liability, referred to as vicarious liability....

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claim. If it was hostile environment harassment, the employer still was vicariously liable but could assert a defense by proving it had preventive and corrective policies in place and establishing that the victim employee unreasonably failed to take advantage of the policies. While the terms *quid pro quo* and *hostile environment* still have significance when discussing sexual harassment, as a result of recent Supreme Court cases, their role in establishing employer liability for sexually harassing conduct engaged in by supervisors has diminished.

LIABILITY FOR HARASSMENT

In 1998, the U.S. Supreme Court handed out decisions in two sexual harassment cases, *Burlington Industries, Inc., v. Ellerth*¹⁵ and *Faragher v. City of Boca Raton*,¹⁶ retaining the vicarious liability standard for the harassing conduct engaged in by supervisory employees but bringing an end to consideration of the type of harassment as determining whether the employer may assert a defense to liability. As a result of these cases, employers are vicariously liable for the sexually harassing conduct of their supervisors vis-à-vis subordinate employees regardless of whether the employer knew of the conduct and regardless of what type of sexual harassment is involved. However, the Supreme Court ruled that in cases where the harassment culminates in a tangible employment action, the employer is vicariously liable regardless of whether the employer had preventive anti-harassment policies in place and regardless of whether the employer took remedial action once learning of the conduct.¹⁷

Rationale for Vicarious Liability

Given the significance of applying vicarious liability as the appropriate standard as opposed to negligence which would require a showing of

knowledge on the part of the employer, it is important to understand which employees within the organization may subject their employer to this harsher standard and under what circumstances. The answer to this is not as easy as simply identifying who acts as the supervisor of the victim employee. In *Ellerth*, the Supreme Court provided guidance in determining who may subject the employer to vicarious liability for engaging in sexually offensive conduct by directing that the focus should be on whether the offending employee was aided in the misconduct because of his or her position with the employer. In other words, the victim is in a more vulnerable position because of the authority granted or delegated to the offender.¹⁸

In most civil actions involving claims against an employer for harm caused by employees, the employer is subject to liability for the harm caused by the employee provided the employee was acting within the scope of employment.¹⁹ Thus, liability often is created by a combination of the employment relationship and the conduct causing the harm occurring within the scope of the employee's duties. In the context of sexual harassment, the Supreme Court rejected the notion that this analysis should

dictate the outcome as sexual harassment by a supervisory employee if it is not generally within the scope of employment. Instead, the Supreme Court held that the appropriate analysis centers on whether the employees alleged to have engaged in the offensive conduct were aided due to their relationship to the employer or because of the delegation of

“...liability often is created by a combination of the employment relationship and the conduct causing the harm occurring within the scope of the employee's duties.”

authority through the employment relationship.²⁰ The Supreme Court further commented that in cases involving a tangible employment action, the agency relationship or delegation of authority is evident because of the existence of the employment action itself. In other words, it is attributable to an official action of the agency. As stated by the Supreme Court, “[t]he supervisor

has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.”²¹

When no tangible employment action results, the relationship between the offender and the employer is not so apparent. Therefore, the employer still is vicariously liable but is able to interpose a defense by showing it had antiharassment preventive and corrective policies in place that the victim employee unreasonably failed to take advantage of. As stated by the Supreme Court:

[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.... Whether the agency relation aids in the commission of supervisor harassment which does not culminate in a tangible employment action is less obvious. On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relationship.... On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some

circumstances where the supervisor's status makes little difference.²²

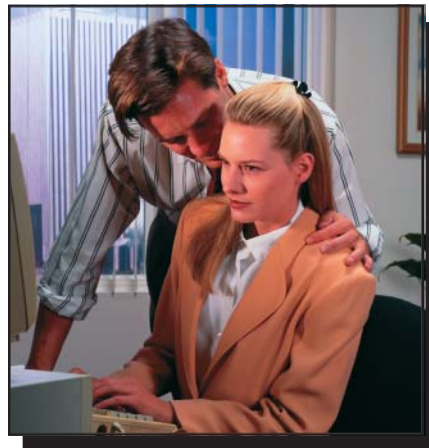
In other words, determining whether the employer can offer a defense to liability is appropriate may not necessarily hinge on the authority level of the offender. Instead, what also must be considered is whether an employment action impacting the employee relates back to the authority of the employer.

Tangible Employment Actions

In *Ellerth*, the plaintiff alleged that she was subjected to numerous and repeated offensive remarks and boorish behavior on the part of a supervisor in the company for which she worked. She claimed that the remarks could be taken as threatening in nature in that if she did not submit to his requests, he would retaliate. Thus, she framed her theory of harassment as quid pro quo harassment.

Burlington Industries countered, arguing that it was hostile environment harassment and asserted a defense to liability, arguing that the plaintiff never had complained of the offensive behavior and, therefore, it did not have knowledge nor could it have reasonably known of the conduct and, thus, should not be liable. The lower court decisions in this case reflect

disagreement as to whether the conduct should be characterized as quid pro quo or hostile work environment harassment.²³ Resolution of this issue was critical to the lawsuit's outcome until the Supreme Court intervened and rejected the notion that the type of sexual harassment should dictate the outcome in cases involving supervisory level harassment, shifting the focus from the type of harassment to whether the employee was subjected to a tangible employment action.²⁴



In *Ellerth*, the Court provided the following definition of tangible employment action:

A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or

a decision causing a significant change in benefits.²⁵

Clearly, there will be many cases in which the existence of a tangible employment action will be indisputable. In *Ellerth*, the Supreme Court provided some examples that would constitute tangible employment actions, such as demotion with a decrease in salary, termination, less responsibilities, and loss of benefits.²⁶ A tangible employment action is not, however, always so easy to identify. To guide in determining whether a tangible employment action was taken, the Supreme Court described the types of actions that can result in liability as actions that often result in financial harm and require an official act of the employer often carried out by a supervisor who has been given the authority to act for the employer.²⁷

With liability for supervisory-level sexual harassment often hinging on whether a tangible employment action was taken as opposed to the type of sexual harassment, any decisions affecting the employee will be closely scrutinized. For example, in *Dedner v. Oklahoma*,²⁸ the plaintiff, a correctional food service supervisor, alleged that her supervisor engaged in offensive and unwelcomed sexual conduct over a period of time. She complained to her employer,

the State of Oklahoma Department of Corrections, about the offending conduct.

An internal investigation was initiated, and he was fired. The victim employee brought a Title VII action against her employer, alleging a tangible employment action was taken against her when her supervisor conditioned benefits in the form of what days off she would have on her willingness to engage in sex with him. The parties agreed that sexual harassment occurred. They disagreed as to whether the harassment resulted in a tangible employment action. The federal district court judge held that allowing an employee to take certain days off does not amount to a change in benefits or status as contemplated by the Court in *Ellerth*, and, thus, no tangible employment action was taken.²⁹

Constructive Discharge as a Tangible Employment Action

While the typical case involves an employer-initiated employment action, the Supreme Court was presented with the issue of whether a decision by an employee to resign could be a tangible employment action giving rise to liability. In *Pennsylvania State Police v. Suders*,³⁰ a former employee sued her former employer, the Pennsylvania State Police (PSP), alleging that her decision

to resign was in response to sexual harassment caused in part by her supervisor for which the PSP should be accountable.

The lower federal court dismissed the lawsuit holding that the employer took no adverse tangible employment action against her given that she resigned, enabling the PSP to defend itself under the *Ellerth-Faragher* affirmative defense.³¹ The court then accepted the

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...what also must be considered is whether an employment action impacting the employee relates back to the authority of the employer.

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agency’s effort to defend itself by demonstrating it had preventive and corrective policies in place of which she failed to take advantage. On appeal to the Federal Court of Appeals in the Third Circuit Court, the court disagreed with the lower court in a couple of significant ways. First, the circuit court concluded that there were critical issues still to be resolved with respect to the preventive and corrective policies the PSP had

in place to address harassment. In addition, the circuit court concluded that material issues of fact remain with respect to whether the plaintiff had established that she was constructively discharged due to the hostile work environment and, perhaps, most important, if she was constructively discharged, whether that would amount to a tangible employment action, meaning no defense to liability could be offered.³² The question of whether a constructive discharge would amount to a tangible employment action was appealed to the Supreme Court.

The Supreme Court agreed with the circuit court that a constructive discharge could be regarded as a tangible employment action on the part of the employer.³³ In deciding whether the decision to resign should be attributable to the employer in the form of a constructive discharge, the Court stated that the employee “must show working conditions so intolerable that a reasonable person would have felt compelled to resign.”³⁴

Once a case for constructive discharge is made by the plaintiff, it does not automatically preclude the possibility that the employer can raise the *Ellerth-Faragher* defense. The Supreme Court distinguished an actual termination of an employee with a constructive discharge,

stating that “[u]nlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be.”³⁵

Accordingly, if the employer can establish that the constructive discharge did not derive from an official act of the agency, then it may assert a defense to liability by showing what preventive and corrective antiharassment policies it had in place and that the employee unreasonably failed to take advantage of them (*Ellerth-Faragher* defense). If it is established that the constructive discharge derived from official acts of the employer, then no defense is available.

To illustrate the significance of the official act, the Supreme Court cited *Reed v. MBNA Marketing Systems, Inc.*,³⁶ a case involving a claim of constructive discharge based on the victim’s assertion that her supervisor made repeated sexual comments and assaulted her. The Federal Court of Appeals for the First Circuit held that as the supervisor’s actions involved no official act on the part of the employer and, in fact, is not at all authorized, the employer could raise the *Ellerth-Faragher* defense to vicarious liability. In contrast, the Court referred to *Robinson v. Sappington*³⁷ to illustrate the role of official action in a

constructive discharge. In this case, the plaintiff complained that she was sexually harassed by the judge for whom she worked. The presiding judge told her he would reassign her to another judge, but he had a reputation for being very difficult, and that “it was in her best interest to resign.”³⁸ The decision to resign was, therefore, at least in part, attributable to an official act of the employer.

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The Continuing Need for Policy and Training

Despite the recent changes in the law relating to sexual harassment, one constant remains—employers should continue to demonstrate a strong commitment to the elimination of sexual harassment in the workplace. Employers should promulgate and post a policy statement on sexual harassment, including a clear

description of the procedures to follow for reporting complaints. In addition, employers should assess their management training programs to determine whether they adequately address the issue of workplace harassment. Such training should include discussion of what constitutes unlawful conduct, what managers must do when they become aware of such conduct, and the process established by the employer for reporting complaints.

CONCLUSION

As much as law enforcement professionals prefer clear and exact legal principles to guide them in their decision making in the workplace, the intricacies of the law makes this impossible. However, one constant in all employment settings is that they are made up of human beings with their own perceptions. The human factor is, perhaps, most evident when it comes to the interpretation of statutory provisions addressing conduct in the workplace occurring because of gender, in other words, sexual harassment. Recently, the Supreme Court provided guidance in assessing the liability of an employer for sexually offensive conduct engaged in by supervisors within the workplace. Central to this guidance is that liability no longer is based on the type

of sexual harassment that occurred. Instead, the initial focus centers on whether there was a tangible employment action taken by or which can be attributed to the employer. Only in cases where no tangible action was taken will an employer be able to point to the preventive and corrective measures it has adopted to defend itself. ♦

Endnotes

¹ 42 U.S.C. § 2000e-2(a) provides as follows:

§ 2000e-2. Unlawful employment practices

a) Employer practices

It shall be an unlawful employment practice for an employer—

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

² *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976) (sexual harassment actionable as discrimination on the basis of gender). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the U.S. Supreme Court held that Title VII prohibits sexual harassment even in situations where an employee does not suffer economic loss and even if the conduct was consensual, as long as it was unwelcomed.

³ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998). See also *Hartsell v. Duplex*, 123 F.3d 766 (4th Cir. 1997) (court refused to recognize demeaning remark as actionable under Title VII, stating that Title VII does not guarantee sophistication or proper behavior in the workplace; it only prohibits conduct that is so severe or pervasive as to create an objectionably reasonable hostile or abusive environment).

⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

⁵ *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003).

⁶ 229 F.3d 1343 (11th Cir. 2000).

⁷ See also *Holman v. State*, 211 F.3d 399 (7th Cir. 2000) (Lower court decision to dismiss complaint alleging sexual harassment upheld on appeal on the basis that victims, a husband and wife who worked for the same supervisor, could not be subjected to offensive conduct based on gender as the "equal opportunity" harasser offended both genders).

⁸ 523 U.S. 75 (1998).

⁹ See *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 753-754, citing *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-514 (9th Cir. 1994).

¹⁰ *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3rd Cir. 1997); *Speaks v. City of Lakeland, Florida*, 315 F.Supp.2d 1217 (M.D. Fla. 2004).

¹¹ 477 U.S. 57 (1986). See also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

¹² *Faragher* at 786, quoting *Meritor* at 67.

¹³ *Harris v. Forklift Systems, Inc.*, at 21-22.

¹⁴ *Id.* at 23. See also *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

¹⁵ 524 U.S. 742 (1998).

¹⁶ 524 U.S. 775 (1998).

¹⁷ *Id.* See also, *Leopold v. Baccarat*, 239 F.3d 243 (2d Cir. 2001).

¹⁸ *Ellerth* at 754-755.

¹⁹ See Restatement (Second) of Agency, § 219(1).

²⁰ *Ellerth* at 760-762. See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 784 (1998).

²¹ *Id.* at 762.

²² *Id.* at 762-763.

²³ *Id.* at 749-750.

²⁴ *Id.* at 754.

²⁵ *Id.* at 761.

²⁶ *Id.*

²⁷ *Id.* at 762.

²⁸ 42 F.Supp.2d 1254 (E.D.Oklahoma 1999).

²⁹ *Id.* at 1258. As to the second basis for liability under *Ellerth-Faragher*, the Court held that the state took reasonable care to prevent and correct harassment and that she unreasonably failed to take advantage of the preventive or corrective policies of the state by waiting nearly 3 months to complain about the offending conduct, after the second incident already had occurred. *Id.* at 1260.

³⁰ 542 U.S. 129 (2004).

³¹ See Brief for Appellant in No. 01-3512, p. 2

³² *Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003).

³³ *Suders* at 141.

³⁴ *Id.*

³⁵ *Id.* at 142 (emphasis supplied).

³⁶ 333 F.3d 27 (1st Cir. 2003), cited in *Suders* at 140.

³⁷ 351 F.3d 317 (7th Cir. 2003), cited in *Suders* at 140.

³⁸ *Suders* at 140, quoting *Robinson v. Sappington*, 351 F.3d 317, 324 (7th Cir. 2003).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.



Officer Adkins



Officer Webster

One afternoon, Officers Cornis Adkins and Michael Webster of the Aberdeen, Maryland, Police Department responded to a call involving a woman trapped in a third-floor apartment in a burning building. Upon arrival, Officer Adkins saw the victim standing in her window and screaming for help. Immediately, he located an extension ladder from a maintenance shed, extended it to her window, and attempted to calm her. Officer Webster also climbed the ladder and steadied Officer Adkins. After determining that there were two young children in the apart-

ment, which was completely filled with smoke and flames, Officer Adkins grabbed each of them and passed them to Officer Webster, who lowered them to the ground. Then, Officer Adkins pulled the woman outside and helped her down the ladder. The three victims then received medical treatment. The quick, heroic actions of these officers saved this mother and her two children from a fire that completely destroyed their residential complex and two adjacent buildings.



Officer Sesoko

Early one morning, Officer Shayne Sesoko of the Honolulu, Hawaii, Police Department responded to a report of a resident hearing a loud splash and barking dogs. Upon arrival, he found a 10-year-old autistic boy struggling in approximately 8 feet of water in a drainage canal. Officer Sesoko, with the help of a nearby resident, threw in a discarded box spring for the boy to hold onto, but it sank into the murky water. Seeing that the boy was slipping under water for longer periods of time, Officer Sesoko removed his shirt, shoes, equipment belt, and bullet-resistant vest and entered the canal. Struggling to keep the boy above water, Officer Sesoko's feet kept getting stuck in the muck at the bottom. He was beginning to tire and was unsure of how to get out of the water. When he saw that his partner, Officer

Timothy Tenney, now was at the scene, he submerged himself beneath the boy and pushed him to his fellow officer. Because of the bravery and self-sacrifice of Officer Sesoko and the assistance of Officer Tenney, the boy escaped unharmed.

Nominations for the **Bulletin Notes** should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.

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Patch Call



The patch of the Williams, Arizona, Police Department displays the copper star and the sun's rays, which are found on the state flag. Below this emblem is historic Bill Williams Mountain, situated within Kaibab National Forest. The Grand Canyon is symbolized in the foreground.



The villages of Kimberly and Little Chute, Wisconsin, are divided by the Fox River and joined together by the Community Bridge. The two police agencies consolidated to create the Fox Valley Metro Police Department. Its patch reflects the paper industry and the strong Dutch heritage within both communities.